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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1986

HAMID R. KASHANI,
Cross-Respondent,

v.

PURDUE UNIVERSITY, et al.,
Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

July 9, 1987

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QUESTION PRESENTED

Whether the Eleventh Amendment bars the §1983 claim of a graduate student terminated from a doctoral program which seeks an injunction against university officials compelling his reinstatement, where the exclusive power to effectuate such a remedy resides with The Trustees of Purdue University, an arm of the State of Indiana.

LIST OF PARTIES

The parties to the proceeding below were Cross-Respondent, Hamid R. Kashani, Purdue University, The Trustees of Purdue University, and the following individual university officials: Steven C. Beering (University President), Struther Arnott (Vice-President for Research and Graduate Dean), Richard J. Schwartz (Head of the School of Electrical Engineering), George R. Cooper (Graduate Coordinator), Austin L. Shelley (Executive Assistant to the Head of the School of Electrical Engineering), Clarence L. Coates (Professor), Robert F. Pierret (Professor), Paul C. Krause (Professor), Clarence D. McGillem (Professor), and Robert L. Gunshor (Professor).

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

HAMID R. KASHANI,
Cross-Respondent,

v.

PURDUE UNIVERSITY, et al.,
Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Cross-Petitioners, Purdue University, The Trustees of Purdue University, and the several named individual university officials, (hereinafter referred to collectively as "Purdue"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion entered herein by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 813 F.2d 843; the slip opinion is reprinted in the Appendix, p. 1a, et seq., infra. The judgment of the Court of Appeals is reprinted in the Appendix at p. 11a, infra.

The opinions and the judgment of the United States District Court for the Northern District of Indiana have not been reported. They are reprinted in the Appendix commencing at pages 12a, 19a, & 33a.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 10, 1987. No rehearing was sought.

The instant Cross-Petition for Writ

of Ceriorari is filed under Rule 19.5 of this Court. Counsel of record for the Cross-Petitioners received the Petition for Certiorari of Cross-Respondent on June 9, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

This case directly involves the Eleventh Amendment to the United States Constitution; this Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Cross-Respondent's claim for relief against the Purdue Defendants in the

District Court was predicated upon 42 U.S.C. §1983, which statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Kashani's complaint in the District Court purported to state claims for legal relief (i.e. money damages), and, for equitable relief (i.e. an injunction

reinstating him as a graduate student). These claims were based upon 42 U.S.C. §1983 and an alleged violation of the Equal Protection Clause of the Fourteenth Amendment in the form of unlawful national origin discrimination. Kashani named as Defendants "Purdue University,"[1/] The Trustees of Purdue University, and nine individual university officials.

By way of Memorandum Opinions dated October 9, 1984 and March 22, 1985, the District Court dismissed Kashani's claims for want of subject matter

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[1/] It should be noted that the only corporate entity with the capacity to be sued is The Trustees of Purdue University. IND. CODE ANN. §20-12-36-4 (Burns) (This statute is reproduced in the Appendix hereto at p. 1b.) See FED.R.CIV.P. 17(b). Technically speaking, "Purdue University" does not exist apart from the bricks and mortar of which it is made. Accord Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 520, n. 2 (1982) (Powell, J., concurring).

jurisdiction, save his claim seeking money damages against certain of the individual Defendants in their individual capacities. (See Appendix at pp. 12a & 19a.) These rulings of the District Court were based in part upon its contemporaneous analysis and ruling in the case of Wellman v. Trustees of Purdue University, 581 F. Supp. 1228 (N.D. Ind. 1984), wherein, it was held that The Trustees of Purdue University is an arm of the State of Indiana entitled to the immunity from suit in federal courts accorded by the Eleventh Amendment. Kashani's claim for money damages against the individual Defendants in their individual capacities was dismissed with prejudice pursuant to a stipulation of the parties--see Order and Entry of the District Court dated June 28, 1985. (See Appendix A at p. 33a.)

The United States Court of Appeals for the Seventh Circuit affirmed in part, reversed in part, and remanded. The Seventh Circuit held as follows: "In this appeal we uphold the conclusion that Purdue University shares in the sovereign immunity of the State of Indiana under the Eleventh Amendment. We hold further, however, that the Eleventh Amendment does not bar suit against the officials for the injunctive relief of reinstatement into the doctoral program." (Appendix at p. 1a, 813 F.2d at 844.)

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The Seventh Circuit's Holding that the Eleventh Amendment "Does not Thwart the Claims Against the Officials in Their Official Capacities for the Injunctive Relief of Reinstatement" Conflicts with Applicable Decisions of this Court.

This Decision by the Seventh Circuit Further Conflicts with the Decisions of Other Federal Courts of Appeals.

A.

> [A]lthough the eleventh amendment does not ordinarily bar federal courts from ordering states as defendants to give monetary relief, it does not ordinarily prevent federal courts, even in the absence of express congressional authorization, from requiring states, through their officers, to comply with federal injunctions. This distinction is accomplished by fiction: an injunction, so the courts say, simply requires a state officer to act within the scope of his duty; the injunction's prohibitory force, therefore, is felt only when an officer exceeds the scope of his powers, and thus is not acting on behalf of the state; the state, therefore, is not affected by the federal injunction. The leading case is Ex parte Young [209 U.S. 123 (1908)].

TRIBE, AMERICAN CONSTITUTIONAL LAW, §3-38, at p. 144 (1978).

Professor Tribe's succinct explication of the parameters of the

Eleventh Amendment's sovereign immunity makes pellucid the fundamental error reflected in the holding below that,

> [a]lthough the eleventh amendment bars all claims against Purdue and the damage claims against its officials in their official capacities, it does not thwart the claims against the officials in their official capacities for the injunctive relief of reinstatement.

813 F.2d at 848; Appendix at p. 9a. This holding controvenes the narrow exception created by Ex parte Young precisely because any such decree enjoining Kashani's reinstatement must, necessarily, be carried out by an official acting on behalf of the state instrumentality, within the scope of his official powers. As such, it is a decree operating directly against the state instrumentality which is barred by the Eleventh Amendment.

B.

The first and basic issue relevant to a determination of whether the District Court had any power to affirmatively enjoin the "reinstatement" of Kashani, is whether such an equitable decree could be issued directly against Purdue University or The Trustees of Purdue University, eo nomine. The indisputable answer to this question is that the Eleventh Amendment constitutes an absolute jurisdictional bar to the award of any form of relief against state instrumentalities like Purdue University or The Trustees of Purdue University. Legal and equitable relief of any nature are precluded: as to both Purdue University and The Trustees of Purdue University, the Eleventh Amendment constitutes an impenetrable barrier to Kashani's 42 U.S.C. §1983

claims. In Cory v. White, 457 U.S. 85 (1982), the court expressly held that as it pertains to a direct claim against a state instrumentality, the Eleventh Amendment's immunity encompasses claims for equitable, as well as monetary relief:

> [We do not hold], however, that the Eleventh Amendment never applies unless a judgment for money payable from the State Treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt this suggested rule, limiting the strictures of the Eleventh Amendment to a suit for money judgment, would ignore the

> explicit language and contradict the very words of the amendment itself.

457 U.S. at 90-91; see also: Alabama v. Pugh, 438 U.S. 781, 782 (1978); Missouri v. Fiske, 290 U.S. 18, 27 (1933) ("[The Eleventh Amendment expressly applies to] suits in equity as well as at law, the amendment necessarily embraces the demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a state."); Ex parte Ayers, 123 U.S. 443 (1887).

C.

Because the District Court was without jurisdiction to order Purdue University or The Trustees of Purdue University to reinstate Kashani, and because any order for reinstatement

would impact directly upon (and could only be acted upon by) those state institutions, through their governing body corporate, it naturally follows that such an affirmative injunction cannot issue against any subordinate individual Purdue officials.

Contemporary case law under the Eleventh Amendment often uses the terms "retroactive" and "prospective" in discussing Eleventh Amendment injunctive relief issues, indicating that "retroactive" relief is barred by the Eleventh Amendment, and that "prospective" relief is not. Kashani v. Purdue, 813 F.2d at 848 (Appendix at 9a); see also, Toledo, Peoria & Western Railroad Co. v. State of Illinois, 744 F.2d 1296, 1298-99, n. 1 (7th Cir. 1984). This dichotomy embodies a fundamental distinction which is dispositive of the question presented

by the instant petition: can the equitable relief prayed for effectively operate against the individual state officials, or is the state instrumentality itself the only real party against whom such a decree can operate?

This issue was directly addressed in the case of Toledo, Peoria & Western Railroad Co. v. State of Illinois, supra (hereinafter "T.P.&W."). In that case, the Seventh Circuit held that the District Court was without the power to order the individual state officials to convey state-owned real estate to the plaintiff. In so holding, the Seventh Circuit said:

> [H]ere the cause of action against the three [Illinois Department of Transportation] officials would directly impact the state. It is the state that holds the disputed interest in the property, not the officials. We hold that this action nominally against the [state] officials but in fact against the state also

> fails for lack of federal court jurisdiction.

744 F.2d at 1299; see also: Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101, n. 11 (1984) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.'") (emphasis supplied) [quoting from Dugan v. Rank, 372 U.S. 609, 620 (1963)]. Therefore, the relief sanctioned by the Seventh Circuit's holding below, viz., an order enjoining the individual university officials, in their official capacities, to retroactively reinstate Kashani is indistinguishable from a judgment

compelling the government to take affirmative action.

Only The Trustees of Purdue University have the legal capacity to effect the "reinstatement" of a terminated graduate student. For example, IND. CODE ANN. §20-12-1-2 provides in relevant part that,

> (a) [T]he Trustees of Purdue University . . . shall have the power and duty: . . . (6) to prescribe the conditions and standards of admission of students upon the bases as are in its opinion in the best interest of the state and the institution; (7) to prescribe the curricula in courses of study offered by the institution and define the standards of proficiency and satisfaction within the curricula and courses established by the institution;

See also IND. CODE ANN. §20-12-36-4, (see Appendix at pp. 1b, 2b). In any such situation, "[t]he general rule is that the relief sought nominally against an officer is in fact against the

sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (emphasis supplied). For the simple reason that any decree enjoining the "reinstatement" of Kashani would, perforce, operate against and directly impact the state, it is barred by the Eleventh Amendment.

It is essential to point out that the "reinstatement" sought by Kashani in no way implicates the narrow exception to the jurisdictional bar of the Eleventh Amendment carved out by the landmark case of Ex parte Young, 209 U.S. 123 (1908). The holding of that case is entirely consistent with the foregoing all-critical distinction between "prospective" and "retroactive" equitable relief:

> [A] suit challenging the constitutionality of a state official's action is not one against the state. . . . The theory of [Ex parte Young] was

> that an unconstitutional enactment is "void" and therefore, does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." . . . Since the state could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected to the consequences of his individual conduct."

Pennhurst State School & Hospital v. Halderman, supra, 465 U.S. at 102-103 (quoting from Ex parte Young, 209 U.S. at 160.) To reiterate, the narrow type of injunctive relief allowed under the rule of Ex Parte Young is fundamentally different from the type sanctioned by the Seventh Circuit's holding below. In that case, the injunction could effectively issue directly against the individual state official; it was enough in that case to order Attorney General Young to personally cease his illegal conduct--the state itself was not

affected: the state was not an indispensable party to the decree, and, it was not "directly impacted" thereby.

All that Ex parte Young really stands for is the narrow proposition that a suit enjoining a state official from taking any further action to enforce an unconstitutional statute is not one against the state; the individual "official" in such a situation is not acting under any state authority, for purposes of the Eleventh Amendment. As pointed out by this Court in Edelman v. Jordan, 415 U.S. 651, 664 (1974), the decision in Ex parte Young merely restrained the "future conduct" of the state official in question (actually, in his individual capacity, since the actions against which he was enjoined would not have been state authorized actions). The Seventh Circuit's reliance upon Ex

parte Young for the proposition that the Eleventh Amendment "does not thwart the claims against the officials in their official capacities for the injunctive relief of reinstatement" constitutes a misapplication of the narrow exception created by that earlier decision. It must be emphasized that the effect of Ex parte Young was not to order the official to perform any affirmative act which would have "reversed" or impacted upon any prior action of the state. The essence of the Ex parte Young exception was that "[t]he injunction's prohibitory force . . . is felt only when an officer exceeds the scope of his powers, and thus is not acting on behalf of the state; the state, therefore, is not affected by the federal injunction." TRIBE, supra. "In accordance with its original rationale, Young applies only

where the underlying authorization upon which the named official acts is asserted to be illegal." Papasan v. Allains, 478 U.S. ___, ____, 106 S.Ct. 2932, 92 L.Ed.2d 209, 225 (1986). And, finally, as this Court more recently iterated in its decision in Pennhurst State School & Hospital v. Halderman, supra, 465 U.S. at 102, "The theory of Ex parte Young has not been provided an expansive interpretation."

D.

There exists a conflict in the decisions of several circuit courts of appeals specifically concerning the nature of the equitable relief available against individual state officials consistent with the Eleventh Amendment. In the case of Chiz's Motel and Restaurant v. Mississippi State Tax

Commission, 750 F.2d 1305 (5th Cir. 1985), the license of the plaintiff-bar motel owner had been revoked by the Mississippi Tax Commission, prompting the commencement of a §1983 action against the commission and its individual members which sought the recovery of money damages and the reinstatement of the license. Without reaching the merits of the case, the Fifth Circuit held that the Eleventh Amendment barred such claims against both the commission and its individual members, stating its holding thusly,

> [B]ecause [plaintiff] seeks monetary damages and an injunction that would operate retroactively, we concluded that the Eleventh Amendment bars [plaintiff's] action in federal court. . . . [Plaintiff] argues that its action comes within the exception to a state's Eleventh Amendment immunity recognized by the Supreme Court in Ex parte Young . . .. In Young the court held that the Eleventh Amendment did not

> forbid a federal court to issue an injunction to prevent the attorney general of Minnesota from bringing suit to enforce an allegedly unconstitutional statute. [Plaintiff] argues that under Young a federal court may exercise equitable jurisdiction over state officials sued as nominal defendants. [W]e disagree. The Supreme Court has consistently construed the Young exception narrowly [citing Edelman v. Jordan, supra]. Moreover, as the court reaffirmed in Pennhurst, the Young exception serves only to permit a federal court to grant prospective injunctive relief; federal courts remain barred under the Eleventh Amendment from granting legal or equitable retroactive relief [citing Pennhurst].

750 F.2d at 1307-08 (emphasis in original). See also: Brinkman v. Gilligan, 610 F. Supp. 1288, 1292 (S.D. Ohio 1985); T.P.&W., supra. These decisions of lower federal courts regarding the scope of the Eleventh Amendment's immunity, as well as the distinction between "retroactive" and

"prospective" equitable relief as it pertains thereto, are wholly consistent with the holdings in a series of civil war era decisions by this Court. In the case of Haygood v. Southern, 117 U.S. 52 (1886), the plaintiffs were suing to compel officers of the State of South Carolina to redeem revenue bond scrip which the state had issued in settlement of an earlier obligation. At the time of issuance, the state agreed to levy a tax to redeem the certificates, and state officers were also directed to accept the scrip in payment of other state taxes. These obligations were almost immediately repudiated, however, by legislation repealing the special tax and forbidding tax collectors to accept the scrip. Thecourt, speaking through Justice Matthews, reversed the judgment of the Circuit Court granting relief. While

South Carolina's repudiation of the scrip constituted an impairment of its contractual obligations, affirmative relief against the officer would constitute, the court held, relief against the state barred by the Eleventh Amendment. The court's opinion stressed that the remedy sought by the plaintiffs was in effect an order for specific performance of the state's contract. The court stated that a judgment against the officers "commanding them to perform official functions on behalf of this state according to the dictates and decrees of the court is, if anything can be, a judicial proceeding against the state itself." Id. at 69. In determining that the action before it was, in reality, one directed against the

state, the court in Haygood made the following important distinction.

> "A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the [state officials], the performance of an obligation which belongs to the state in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, are claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void.

Id. at 70; see also: Ex parte Ayers, 123 U.S. 443; State of Louisiana v. Jumel, 107 U.S. 711 (1885); State of North Carolina v. Temple, 134 U.S. 22 (1889); Pennoyer v. McConnaughy, 144 U.S. 1 (1890); see, generally, Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part I, 126 U.PA.L.REV. 515, 515-21 (1978); Jaffey, Suits Against Governments and

Officers: Sovereign Immunity, 77 HARV.L.REV. 1, 21-29 (1963); JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY, c. 5 (1972).

The holdings in Chiz's Motel, T.P.&W. are not only contrary to the Seventh Circuit's holding in the case sub judice, but they also conflict with the Sixth Circuit's decision in Hall v. Medical College of Ohio at Toledo, 42 F.2d 299, 307 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985), and the Second Circuit's decision in Dwyer v. Regan, 777 F.2d 825, 836 (2nd Cir. 1985).

E.

The Supreme Court's recent decision in Pennhurst stated and reaffirmed the general rules which require the dismissal of all of the equitable relief

sought by Kashani against all of the Purdue-Defendants in the instant case:

> [W]hen the suit is brought only against state officials, a question arises as to whether that suit is a suit against the state itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945). See, e.g., Ex parte Ayers, 123 U.S. 443, 487-492, 8 S.Ct. 164, 31 L.Ed. 216 (1887); Louisiana v. Jumel, 107 U.S. 711, 720-23, 727-28, 2 S.Ct. 128, 27 L.Ed. 448 (1882). Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963) (per curiam). And, as when the state itself is named as the defendant, a suit against state officials that is in fact a suit against a state is barred regardless of whether it seeks damages or injunctive relief. See Cory

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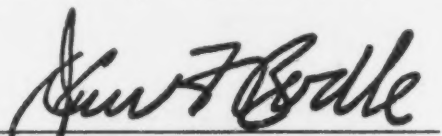
v. White, 457 U.S. 85, 91, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982).

465 U.S. at 101-102; see also: Larsen v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 691, n. 11 (1949) ("[A suit is one against the sovereign] if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. . . ."") (emphasis supplied); Dugan v. Rank, supra 372 U.S. at 620.

In conclusion, Kashani's purported claim seeking relief in the form of "reinstatement" against The Trustees of Purdue University and the individual Purdue officials is undisguisable: the relief is in fact against the state itself, and, therefore, the District Court correctly dismissed this claim

for want of subject matter jurisdiction under the Eleventh Amendment. The Seventh Circuit's holding to the contrary conflicts with prior decisions of this Court and, therefore, it should be reversed.

Respectfully submitted,



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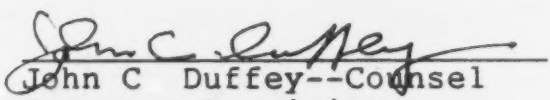

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2306

HAMID R. KASHANI,

Plaintiff-Appellant,

v.

PURDUE UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana.
No. L 83-24—Allen Sharp, *Chief Judge.*

ARGUED SEPTEMBER 23, 1986—DECIDED MARCH 10, 1987

Before BAUER, *Chief Judge,* WOOD, *Circuit Judge,* and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Hamid R. Kashani sued Purdue University and various of its officials under 42 U.S.C. § 1983, alleging that he was terminated from a doctoral program at Purdue University on the basis of national origin. The trial court held his claims both for damages and for reinstatement barred by the Eleventh Amendment. In this appeal we uphold the conclusion that Purdue University shares in the sovereign immunity of the State of Indiana under the Eleventh Amendment. We hold further, however, that the Eleventh Amendment does not bar suit against the officials for the injunctive relief of reinstatement into the doctoral program.

I

Hamid R. Kashani, an Iranian, was terminated from the doctoral program in electrical engineering at Purdue University in Indiana during the "Hostage Crisis." He filed a section 1983 action, alleging discrimination on the basis of national origin contrary to the Equal Protection Clause. The suit named as defendants Purdue University; the trustees and president of the university, in their official capacities; various graduate school officials and members of the Ph.D. Review committee, in both their official and individual capacities. Kashani sought both monetary damages and reinstatement from all defendants, except for the claims against the officials in their individual capacities, which sought only monetary damages.

The district court dismissed for lack of subject matter jurisdiction the claims for monetary relief against the University and against the various officials in their official capacity on the basis that Purdue was entitled to the protection of the Eleventh Amendment. The court subsequently dismissed all claims for injunctive relief, on the basis of the Eleventh Amendment. To enable appeal, the parties stipulated to dismissal of the remaining claims for monetary relief against officials in their individual capacities. Kashani does not appeal these stipulated dismissals. Kashani thus appeals only the claims against the university and against its officials in their official capacity. Against both, Kashani seeks monetary and injunctive relief. For the reasons stated below, we hold that Purdue is an arm of the state entitled to the protection of the Eleventh Amendment. We thus affirm the dismissal of all claims against the university and all claims against the officials for monetary relief. We hold, however, that the injunctive relief of reinstatement is not barred by the Eleventh Amendment and thus reverse the dismissal of the claims for injunctive relief against the officials in their official capacity.

II

The jurisdictional bar of the Eleventh Amendment protects the state and its agencies; it does not shield political subdivisions. The question here, then, is whether Purdue "is more like a county or city than it is like an arm of the State." *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 573 (1977) (local school board not entitled to immunity). The question of sovereign immunity for a state university is not unexplored territory. The vast majority of cases considering the issue have found state universities to be forfended by the Eleventh Amendment. *E.g., Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796 (1985); *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983) (Southern Illinois University and University of Illinois); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) (San Francisco State College); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 558 (5th Cir. 1982) (Stephen F. Austin State University); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981) (University of Arizona); *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) (University of Puerto Rico); *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971). In fact, the parties' briefs and our own research have failed to reveal a single circuit court opinion holding a state university not entitled to Eleventh Amendment immunity. There are district court opinions to the contrary. *E.g., Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), *rev'd on other grounds* 538 F.2d 991 (3rd Cir. 1976).

Although state universities have consistently been found to be entitled to immunity, courts reexamine the issue with regard to the facts of each case "because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning." *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. 1982). However, given the great number of cases holding state universities to be instrumentalities of the state for Eleventh Amendment purposes, it would be

an unusual state university that would not receive immunity. The analyses in these cases support our holding that Purdue is an instrumentality of the State of Indiana, enjoying its sovereign immunity.

A

Courts have looked to a number of criteria in deciding this issue. The most important factor is the extent of the entity's financial autonomy from the state. "[A] crucial question in determining whether the suit should be regarded as one against the state is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *accord Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351, 357 (7th Cir. 1983). Courts consider the extent of state funding, the state's oversight and control of the university's fiscal affairs, the university's ability independently to raise funds, whether the state taxes the university, and whether a judgment against the university would result in the state increasing its appropriations to the university.

Purdue receives approximately one third of its income directly from the state. For example, in the academic year 1982-83, the university received slightly over 36% of its income from state appropriations. Other sources, with approximate percentages, were auxiliary enterprises (17%); student fees (16%); gifts, grants, and contracts (13%); sales and services (7%); student aid (4%); federal appropriations (3%); organized activities (2%); endowment income (.1%).

Indiana examines Purdue's finances carefully in deciding on the amount of appropriations. Indiana's Budget Agency Act, Ind. Code §§ 4-12-1-1 *et seq.*, expressly includes Purdue in the definition of "state agency." The definition expressly excludes "cities, towns, townships, school cities, school towns, school townships, school districts, [and] other municipal corporations or political subdivisions of the state." As a "state agency," Purdue is required to pre-

pare and file a detailed statement of all expenditures it made in the last budgetary period or expects to find necessary in the next budgetary period. The statement must show reasons for all expenditures, "showing particularly the reason for any requested increase or decrease over former appropriations." The Budget Agency is empowered to require the submission of additional information and to hold hearings. The Budget Agency analyzes the statement and submits its recommendations to the legislature. Thus, Purdue would have to report the payment of a judgment to the legislature as part of its financial report. *Cf. Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985) ("Where the budget of an entity [Troy State University] is submitted to the state for approval, this suggests that the entity is an agency of the state."). The state exercises further supervision of Purdue's finances through the Commission for Higher Education, which is empowered under Ind. Code § 20-12-05-8 to review appropriation requests and make recommendations to the governor, budget agency, and legislature.

Purdue has no power to levy taxes. So although Purdue has sources of revenue other than appropriations from the legislature, it lacks the ability that cities and counties typically have to require payments in the form of taxation. It can raise money only by entering into one of various markets: the market for bonds, for higher education, for services, and so forth. Paying a judgment in a case like the present is also not one of the purposes for which Purdue is authorized to issue bonds. The absence of the power to tax is a strong indication that an entity is more like an arm of the state than like a county or city, because that enablement gives an entity an important kind of independence. The absence of that authority, for an entity like Purdue, ensures ultimate fiscal reliance upon the state. *Cf. Mackey v. Stanton*, 586 F.2d 1126, 1131 (7th Cir. 1978), *cert. denied*, 444 U.S. 882, 100 S. Ct. 172 (1979) ("More important, both have the power to raise their own funds by tax levy and by bond issuance."); *United Carolina Bank v. Board of Regents*, 665

F.2d 553, 558 (5th Cir. 1982) ("Most telling is the power of junior colleges to levy ad valorem taxes . . . . Under Texas law, political subdivisions are sometimes defined as entities authorized to levy taxes."); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796 (1985) ("[N]one of the state universities or colleges . . . have power to levy taxes to service such bond issues or otherwise provide revenue independent of state appropriations.").

Indiana has exempted Purdue from taxation, a relief that some courts find indicative that an entity is an arm of the state rather than a subdivision. Indiana, however, extends that relief also to political subdivisions, so the factor has less force in this case.

If a judgment were awarded against Purdue, the state treasury would not write out a check to Kashani. But in view of the fact that Purdue is by design dependent on state appropriations, which are evidently carefully geared through close oversight to meet the changing financial needs of the university, it is apparent that the payment would directly affect the state treasury. Indiana has not created an entity with a separate financial basis; it has created one that is dependent upon and functionally integrated with the state treasury. Our examination of the extent of Purdue's fiscal autonomy, then, strongly indicates that Purdue is entitled to Eleventh Amendment immunity.

B

In determining whether Purdue is independent of the state, we must consider, beside Indiana's financial constraints on the university, the general legal status of the university. "The answer depends, at least in part, upon the nature of the entity created by state law." *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 572 (1977).

The issue cannot be resolved by simple reference to Indiana statutory definitions. Indiana statutory law relating

to Purdue sometimes defines Purdue as a state agency, sometimes as a political subdivision. The Budget Agency Act, as noted above, expressly includes Purdue in the definition of "state agency," while expressly excluding from that definition municipalities, counties, and school districts. The Tort Claims statute, on the other hand, includes a "State college or university" in the definition of "Political subdivision" and excludes a "political subdivision" from the definition of "state agency." The Act, however, expressly provides "Nothing contained in this chapter shall be construed as a waiver of the eleventh amendment. . . ." Other statutory definitions and references point in both directions, depending on the particular statutory purpose and framework. We must look to substance rather than form.

Very significant in considering whether Purdue has sufficient autonomy from the State of Indiana to be considered more like a county or city than like an arm of the state is the fact that the majority of the members of Purdue's governing council, the Board of Trustees, are selected by the Governor of Indiana. Indiana Statutes Ann. 20-12-37-2 (Burns 1985). *Cf. United Carolina Bank v. Board of Regents*, 665 F.2d 553, 558 (5th Cir. 1982) ("Their governing bodies are elected by local voters rather than being appointed by the Governor with the advice and consent of the Senate."); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985) ("Troy State University is subject to substantial state control; its Board of Trustees . . . is composed in part of state officials and in part of gubernatorial appointees."). The Governor has the right to select seven of the ten Trustees; the Purdue Alumni Association selects the other three.[1] The Governor officially appoints all ten. The Trustees serve terms ranging from one to three years.

[1] Of the seven Trustees selected by the Governor, under Ind. Stat. 20-12-37-4, one must be a woman, two must be "men of prominence and character in agricultural pursuits; two [2] shall be men chiefly engaged in manufacturing industries; and two [2] shall be citizens of character and distinction; one [1] must be a full time student of Purdue."

The Board has the right to regulate the use of university property and the conduct of persons on that property, to set fees and tuition, to discipline students and faculty, to prescribe admission standards, to establish curricula, to set academic standards, and to award financial aid. Ind. Code § 20-12-1-2. It would seem that the delegation of such powers is necessary to enable the university to function. The Trustees are also authorized to enter into contracts; to sue, be sued, settle lawsuits, and pay judgments; to exercise eminent domain; to engage in construction projects and own land. The various powers granted are an indication of independence. But that is undercut by the fact that the majority of the members of the Board itself are selected by the chief executive officer of the state and serve for a maximum of three years. Thus the independence is circumscribed. Moreover, the legislature expressly retained the power to amend or repeal the duties and powers of the Trustees. Ind. Code § 20-12-36-6. From that perspective, the functions granted the board appear less like the independent powers of a city or county than like the authority delegated to an instrumentality of the state to spare the legislature the need to ratify its every action. Also these powers are granted the university only so that it is able to carry out its primary purpose of education, in contrast to a city or county, whose exercise of such powers, in far more extensive form, is its very raison d'etre.

The Court in *Mount Healthy* looked not just to whether the entity was formed with independent powers from the state but also to whether it served the state as a whole or only a region. *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 572 (1977) ("Petitioner is but one of many local school boards within the State of Ohio."); *See also Mackey v. Stanton*, 586 F.2d 1126, 1131 (7th Cir. 1978), *cert. denied*, 444 U.S. 882, 100 S. Ct. 172 (1979) (County departments of welfare "perform their duties on a local level."). Purdue educates students from all parts of the state. The local powers that it has are granted it to enable it to perform that function. Thus,

we conclude as did the district court that the Eleventh Amendment shields Purdue.

III

Although the Eleventh Amendment bars all claims against Purdue and the damages claims against its officials in their official capacities, it does not thwart the claims against the officials in their official capacities for the injunctive relief of reinstatement. Under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), a suit for prospective injunctive relief is not deemed a suit against the state and thus is not barred by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S. Ct. 1347, 1356 (1974); *Quern v. Jordan*, 440 U.S. 332, 337, 99 S. Ct. 1139, 1143 (1979). We recently held that an injunction ordering reinstatement of a pharmacist "is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment." *Elliot v. Hinds*, 786 F.2d 298, 302 (1986). The same result has been reached by the Sixth Circuit regarding reinstatement of a medical student, *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796 (1985), and by the Second Circuit regarding reinstatement of an employee to the payroll, *Dwyer v. Regan*, 777 F.2d 825, 836 (2nd Cir. 1985). We must thus remand for consideration of the reinstatement claim based on Kashani's allegation that the defendant officials intentionally discriminated against him on the basis of his national origin.

IV

For the foregoing reasons, the dismissal of Kashani's claims against Purdue University and the dismissal of the claims for damages against the defendant officials are AFFIRMED. The dismissal of the claims for injunctive relief against the officials in their official capacity is REVERSED and REMANDED for further proceedings consistent with this opinion.

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JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

HAMID R. KASHANI, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of
No. 85-2306 vs.	) Indiana,
	) Lafayette Division.
PURDUE UNIVERSITY, et al., Defendants-Appellees.	) No. 83 C 24) Allen Sharp, Judge

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Lafayette Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, and the cause is REMANDED, in accordance with the opinion of this Court filed this date. Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HAMID R. KASHANI
Plaintiff

v.

No. L 83-24

PURDUE UNIVERSITY; TRUSTEES OF PURDUE UNIVERSITY; STEVEN BEERING, in his official capacity as Acting President of Purdue University; STRUTHER ARNOTT, individually and in his official capacity as Vice-President for Research and Graduate Dean of Purdue University; RICHARD SCHWARTZ, individually and in his official capacity as Head of the School of Electrical Engineering of Purdue University; GEORGE R. COOPER, individually and in his official capacity as Graduate Coordinator and member of Graduate Committee of the School of Electrical Engineering; AUSTIN L. SHELLEY, individually and in his official capacity as Executive Assistant to Head and member of Graduate Committee, School of Electrical Engineering; ROBERT F. PIERRETT, individually and in his official capacity as Chairman of Graduate Committee of School of Electrical Engineering; PAUL C. KRAUSE, individually and in his official capacity as Chairman of Ph. D. Review Committee and member of Graduate Committee of School of Electrical Engineering; CLAIRE D. MCGILLEM and ROBERT L. GUNSHOR, both individually and in their official capacities as members of Ph. D. Review Committee and members of the Graduate Committee of School of Electrical Engineering
Defendants

On October 9, 1984 this court entered an

extensive memorandum following its earlier decision in Wellman v. Trustees of Purdue University, 581 F. Supp. 1228 (N.D. Ind. 1984) and a decision in this court in Elliot v. Hines, 537 F. Supp. 571 (N.D. Ind. 1983). See also, this court's opinions, Hendrix v. State of Indiana, 581 F. Supp. 31 (N.D. Ind. 1984); Burr v. Duckworth, 547 F. Supp. 192 (N.D. Ind. 1982); Schott v. Helper, 101 F.R.D. 99 (N.D. Ind. 1984). Following that, on the 24th of December, 1984 further oral argument was had with reference to the possible application of Eleventh Amendment immunity to the claim for reinstatement of this plaintiff. That issue has also been extensively briefed. Recent authority has eroded the original hesitation of this court to apply the Eleventh Amendment to the request for equitable relief made by this plaintiff in this case. The first basis of that is found in the extensive discussion of Justice Powell, speaking for the majority of the court, in Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984). An extensive discussion in the same vein, more conceptually applicable to the facts of this case is found in Toledo, Peoria and W.R. Co. v.

State of Illinois, 744 F.2d 1296 (7th Cir. 1984). The long and short of it is that the injunctive relief here requested, i.e. reinstatement, is fundamentally no different than the kind of injunctive relief that was discussed by the Court of Appeals in the Toledo case. Perhaps the Fifth Circuit put it most succintly in the very recent decision of Chiz's Motel and Restaurant, Inc. v. Mississippi State Tax Commission, 750 F.2d 1305 (5th Cir. 1985). In that case following Pennhurst the court stated that Eleventh Amendment immunity jurisdiction applies to state agencies and officials acting in their official capacity regardless of the relief the plaintiff seeks and held further that the mandates of Ex Parte Young, 209 U.S. 123 (1908) serves only to permit a federal court to grant prospective injunctive relief and inhibits a federal court under the Eleventh Amendment from granting legal or equitable retroactive relief.

It is the task of this court here to now determine whether the relief is prospective or retroactive and it appears to be the former rather than the latter. In Larson v. Domestic and Foreign Commerce Corp., 337

U.S. 682, 687-88 (1949), the Supreme Court stated:

> The crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or reinstating the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself, may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, in rem, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the government, but because it is, in substance, a suit against the government over which the court, in the absence of consent, has no jurisdiction.

The narrow type of injunctive relief allowed under Ex Parte Young is fundamentally different from the

type sought by the plaintiff in this case. In Ex Parte Young the injunction could effectively issue directly against the individual state official as it was enough to order the Attorney General Young to personally cease his illegal conduct - the State itself was not implicated. Such cannot be said for the equitable relief sought by the plaintiff in this case. The only effective equitable relief would be an affirmative order enjoining the Trustees of Purdue University to reinstate the plaintiff as a graduate student. The Trustees of Purdue University as a part of the sovereignty of the State would be an indispensible party to such an order for it is only the Trustees who possess the power to effectuate the plaintiff's reinstatement. See I.C. 20-12-1-2 and 20-12-36-4. Thus the plaintiff's claim for equitable relief is virtually a suit against the State which is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974) is a manifestation of the narrowness of the Ex Parte Young's abridgement of sovereign immunity under the Eleventh Amendment. In this same vein see Haygood v. Southern, 117 U.S. 52 (1886). This court cannot escape the conclusion that

the equitable relief sought by this plaintiff in reality constitutes relief which is in fact against the sovereign. In order to reinstate the plaintiff as a graduate student the decree would have to operate against the Trustees of purdue University and such relief in the opinion of this court was precluded as early as 1887 in In Re Ayres, 123 U.S. 443, and as recently as 1984 by the Court of Appeals in Toledo and in 1985 by the Court of Appeals for the Fifth Circuit in Chiz. Thus, the claims for injunctive relief must be dismissed. The plaintiff's citation of O'Connor v. Board of Education of School District 23, 645 F.2d 578 (7th Cir. 1981), cert. denied, 454 U.S. 1084 (1981), on remand, 545 F. Supp. 376 (N.D. Ill. 1982) is misplaced since none of the defendants in that case were state officials or agencies subject to Eleventh Amendment immmunity. O'Connor is more in line with Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).

All claims for injunctive relief against all defendants are now dismissed. The remaining damage claims against the defendants in their individual

capacities will go forward and another pretrial conference thereon will be scheduled. The same is set for pre-trial conference on April 25, 1985 at 2:00 o'clock P.M. SO ORDERED

Enter March 22, 1985.

/s/ (Hon.) Allen Sharp

CHIEF JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HAMID R. KASHANI
Plaintiff

v.

No. L 83-24

PURDUE UNIVERSITY; TRUSTEES OF PURDUE UNIVERSITY; STEVEN BEERING, in his official capacity as Acting President of Purdue University; STRUTHER ARNOTT, individually and in his official capacity as Vice-President for Research and Graduate Dean of Purdue University; RICHARD SCHWARTZ, individually and in his official capacity as Head of the School of Electrical Engineering of Purdue University; GEORGE R. COOPER, individually and in his official capacity as Graduate Coordinator and member of Graduate Committee of the School of Electrical Engineering; AUSTIN L. SHELLEY, individually and in his official capacity as Executive Assistant to Head and member of Graduate Committee, School of Electrical Engineering; ROBERT F. PIERRETT, individually and in his official capacity as Chairman of Graduate Committee of School of Electrical Engineering; PAUL C. KRAUSE, individually and in his official capacity as Chairman of Ph. D. Review Committee and member of Graduate Committee of School of Electrical Engineering; CLAIRE D. MCGILLEM and ROBERT L. GUNSHOR, both individually and in their official capacities as members of Ph. D. Review Committee and members of the Graduate Committee of School of Electrical Engineering

Defendants

MEMORANDUM AND ORDER

This case has been the subject of elaborate proceedings since it was filed on February 1983.

The court takes up only that part of the defendants' motion for summary judgment that deals with immunity of damage claims under the Eleventh Amendment of the Constitution of the United States.[1]

Plaintiff's federal claims against the Defendant rest exclusively upon certain alleged violations of his Fourteenth Amendment rights. The statutory mechanism by which Plaintiff seeks to enforce these claims is 42 U.S.C. 1983. The nub of Plaintiff's claim is that he was terminated as an electrical engineering doctoral candidate not for permissible academic reasons but rather, for the impermissible reason that his national origin is Iranian; and that the process within the Electrical Engineering School by which this termination was effectuated was itself "arbitrary and capricious." Plaintiff alleges that this conduct by the Defendant violated his right to due process of the laws, and his right to equal protection of the laws. To recover for these alleged violations, Plaintiff has sued Purdue

University. The Trustees of Purdue University, Steven C. Beering, the President of Purdue University, and various other individuals within the Graduate School and the School of Electrical Engineering.

Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), represents an Eleventh Amendment watershed. In that case, the Court held that state officials might be enjoined as individuals from enforcing a state law which violated the Fourteenth Amendment. The Court reasoned that an official who attempts to take such unlawful action comes into conflict with the superior authority of the Constitution, and is, therefore, "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." Id. at 159-60, 52 L. Ed. at 728-29. The idea that the Court restrained the individual rather than the state was, of course, pure fiction, since the state could not act other than through its officials. However, through this fiction the Court created a narrow exception to the preclusive bar of the Eleventh Amendment, while at the same time leaving intact its primary impetus, viz., that federal

jurisdiction over suits against a state, absent consent, "was not contemplated by the Constitution when establishing the judicial power of the United States." Hans v. Louisiana, 134 U.S. 1, 15, 10 S. Ct. 504, 33 L. Ed. 842, 847 (1890); see also THE FEDERALIST, No. 81 (Lodge Ed. 1902); see generally JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

While the fiction of Ex parte Young might in theory have been employed to order state officials to pay damages the Court did not so extend it. In several suits brought against state officials to recover funds from the state treasury, the Court has found that the state was "the real, substantial party in interest" and held the actions barred by the Eleventh Amendment. Ford Motor Company v. Department of Treasury, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389, 394 (1945); see also Kennecott Corporation v. State Tax Commission, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946); Great Northern Life Insurance Company v. Reed, 322 U.S. 47, 51, 54, 64 S. Ct. 873, 88 L. Ed. 1121, 1124, 1126 (1944).

The rule of Ex Parte Young does not generally extend to suits against the state or its agencies. Moreover, individual state agents are immune from those claims which amount to de facto claims for monetary (i.e. legal) relief against the state. For purposes of this case, current Eleventh Amendment deprives a federal court of subject matter jurisdiction over all claims against states, instrumentalities of states, and individual state agents, except for the power to impose equitable relief.

In the case of Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 662 (1974) the court delineated the parameters of the immunity of the Eleventh Amendment. The District Court in Edelman had ordered the defendants, state welfare officials, to process welfare applications in accordance with the schedule prescribed in federal regulations and to disburse benefits that had been withheld because of unlawful processing delays prior to the court's order. Id. at 656, 39 L. Ed. 2d at 669. The Supreme Court held that the District Court had exceeded its jurisdiction, as delimited by the Eleventh Amendment, in ordering the

payment of benefits wrongfully withheld, Id. at 668-669, L. Ed. 2d at 676. This retroactive portion of the District Court's order was barred because of its likeness to a "monetary award against the state itself." Id. at 665, 39 L. Ed. 2d at 674. The Court approved, however, the District Court's grant of prospective injunctive relief against the individual welfare officials. Id. at 664, 667-68, 39 L. Ed. 2d at 673, 675. The thrust of the holding in Edelman was stated thusly:

> We do not read Ex Parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in Ex Parte Young hewed to no such line.

Id. at 666, 39 L. Ed. 2d at 674-75.

The straightforward rule of Edelman is that an individual may not sue a state, an instrumentality of a state, or an individual state agent, in federal court, where the relief sought "is in practical effect indistinguishable . . . from an award of damages against the state and will to a virtual certainty be paid from

state funds, and not from the pockets of the individual state officials who were the defendants in the action." Id. at 668, 39 L. Ed. 2d 676. A demand upon the "state fisc" by a plaintiff ipso facto deprives a federal court of subject matter jurisdiction; as the Court in Edelman further stated,

> The relief awarded in Ex Parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirements of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.
>
> But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that Court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman the named individual defendant. . . . The funds to satisfy the award in this case must inevitably come from the general revenues of the state of Illinois, and thus the award resembles far more closely the monetary award against the state itself, Ford Motor Co. v. Department of Treasury, supra, than it does the prospective injunctive relief awarded in Ex Parte Young.

415 U.S. at 664-65, 39 L. Ed. 2d at 673-74

Corey v. White, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982) grew out of the fight between the

California State Controller and the Attorney General for the State of Texas over the right to assess taxes upon the Estate of Howard Hughes. After the Supreme Court declined to exercise its original jurisdiction, the administrator of the Estate instigated a federal interpleader action in a federal court in Texas; the above-mentioned state official were the named party defendants.

The Court of Appeals in Corey rejected the state's claim "That although the suit was nominally against state officials, it was in effect a suit against two sovereign states for equitable relief barred by the Eleventh Amendment." 457 U.S. at 88, 72 L. Ed. 2d at 698. In so holding, the Court of Appeals relied upon,

> A passage in the Edelman opinion quoted supra that it interpreted as limiting the bar of the Eleventh Amendment to suits "by private parties seeking to impose a liability which must be paid from public funds in the state treasury" . . . Because the interpleader plaintiff, the administrator of the estate, had sought only prospective relief, the appellate court held that the Eleventh Amendment did not bar his suit.

457 U.S. at 90, 72 L. Ed. at 669. The Court in Corey unequivocably rejected the argument that Edelman had

held that the bar of the Eleventh Amendment extended only to actions seeking de facto monetary relief against a state:

> We are unpersuaded by this view of Edelman. That case involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). Edelman held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), was authority for this result.
>
> Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State . . . ." Thus, the Eleventh Amendmenmt by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of

> the Amendment itself. Edelman did not embrace, much less imply, any such proposition.

457 U.S. at 90-91, 72 L.Ed.2d at 699 (emphasis added).

The holding in Corey v. White is consistent with the earlier per curiam opinion in Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978). In that case, inmates and former inmates of the Alabama prison system sued the state of Alabama and the Alabama Board of Corrections, (as well as a number of prison officials), alleging the conditions in Alabama prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court limited itself to a consideration of "whether the mandatory injunction issued against the state of Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. 1983." Id. at 782, n.2, 57 L. Ed. 2d at 1116. In answering this query in affirmative, the court said:

> Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because

> the Eleventh Amendment prohinbits federal courts from entertaining suits by private parties against States and their agencies. The Court of Appeals did not address this contention, perhaps because it was of the view that in light of the numerous individual defendants in the case dismissal as to these two defendants would not affect the scope of the injunction. There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

438 U.S. at 781-82, 57 L. Ed. 2d at 1116.

The combined effect of Ex Parte Young, Edelman, and Corey is that (1) all suits for damages against a state or one of its instrumentalities are without the subject matter jurisdiction of the federal courts; (2) claims seeking monetary relief against individual state agents which, in reality, would ultimately be satisfied by the state or its instrumentality, are, likewise, barred; and, (3) the only avenue of recourse available to a plaintiff in federal court is the one accorded by Ex Parte Young, to-wit, an action against the individual state agents for equitable relief. These points were recently borne out in a decision in this circuit.

In Cannon v. University of Health Sciences/The

Chicago Medical School, 710 F.2d 351 (7th Cir. 1983), the plaintiff had been denied admission to five different medical schools, including, the University of Illinois and Southern Illinios University (both state universities); she subsequently brought actions of various sorts against these defendants, including a 1983 action against the last-mentioned state universities, and certain admissions officials of each. The District Court held that the Eleventh Amendment barred any damage claim against the state universities and that plaintiff's claim for equitable relief were subject to summary judgment on the ground of mootness. Id. at 355. On appeal to the Seventh Circuit, the plaintiff argued that the Eleventh Amendment was not a bar to her claim for damages because "Her claims were against individual representatives of the two schools as well as the schools themselves . . . and no judgment against the schools or their treasury . . . and finally even though Illinois and SIU are subject to control by the State, they are not the State of itself for purposes of the Eleventh Amendment." Id. at 356.

The Seventh Circuit upheld the district court's

dismissal (based on the Eleventh Amendment) of plaintiff's claims for damages against the state university and extended this bar to their respective admissions officials. The court began by noting that "SIU and Illinois are recognized as state agencies under Illinois law. Elliot v. University of Illinois, 365 Ill. 338, 6 N.E.2d 647 (1936); Ill. Rev. Stat. ch. 127, 132.3(a) (1977). The powers and duties of the boards of trustees are governed by chapter 144 of the Illinois Revised Statutes." Id. In other words, the court determined that the University of Illinois and SIU were both within the ambit of the Eleventh Amendment's immunity. (See Part I-C infra).

The Court in Cannon than proceeded to dispose of plaintiff's argument that the Eleventh Amendment did not preclude her 1983 claim because she had also sued individual admissions official of the two universities. The Court stated:

> The Eleventh Amendment is applicable even though Cannon has attempted to name individual representatives of the universities, as well as the institutions themselves, as defendants. Cannon's complaint refers only to "John Doe" and "Mary Roe." Even if discovery resulted in Cannon's

identifying the individuals and if amending the complaint was held to be consistent with rule 15(c)(2), FED. R. CIV. P. 15(c)(2), the Eleventh Amendment still bars the claims for damages.

In Edelman v. Jordan . . . the Court held that the Eleventh Amendment bars a suit "by private party seeking to impose a liability which must be paid from public funds in the state treasury." . . . Relying on Ford Motor Co. v. Department of Treasury . . ., the Edelman Court reasoned that if the damage award is to be paid by the state, the state is the real party in interest even though individual officials might be named as nominal defendants. . . . In this case, because the state universities are the alter ego of the State, any damage award chargeable to university assets is an award against the State itself. . . . If Cannon's suit would result in a damage award payable by the universities, it is barred by the Eleventh Amendment.

Cannon's allegations pertain to the enforcement, by university authorities, of university's policies that allegedly codoned discrimination on the basis of age with the resulting disparate impact on women. Recovery is sought from the institutions, not the individuals. As the Supreme Court observed in Edelman, it is a "virtual certainty that any damage award will be paid from the state funds, and not from the pockets of the individual state officials who were the defendants in the action." . . . The district judge correctly held, therefore, that Cannon could not recover damages from Illinois or SIU pursuant to her Section 1983 claims.

710 F.2d at 357 (emphasis added) (footnote omitted); see also Rasky v. Department of Registration and Education, 553 F. Supp. 627, 630, 631 (N.D. Ill. 1982) ("Edelman v. Jordan . . . held that the Eleventh

Amendment forbids suits against state officers for retrospective monetary relief. . . . Edelman equally supports dismissal of the 1983 damage claim against department's officials.") (emphasis in original).

By eliminating the plaintiff's claims for damages against both the state universities, and their respective admissions officials, the Seventh Circuit in Cannon proceeded to address the only remaining viable claim which the plaintiff could assert; namely, equitable relief against the individual admissions officials. The Court in that case clearly recognized the limited nature of Ex Parte Young's abrogation of the immunity accorded by the Eleventh Amendment.

The Eleventh Amendment bars plaintiff's claims for legal damage relief against the Trustees of Purdue University. This result is dictated by the Supreme Court decisions discussed above, and by the Seventh Circuit's decision in Cannon.

There can be no doubt that Purdue University is a state agency for purposes of the Eleventh Amendment. Such is the unavoidable result under Indiana law. See Russell v. Trustees of Purdue University, ___ Ind. ___,

163 N.E. 529, 531 (1929); Ind. Code Ann. 20-12-35-1, 20-12-36-4 (Burns). The powers and duties of the Board of Trustees of Purdue University are governed by Ind. Code Ann. 20-12-36-2, 20-12-1-1 et seq. (Burns). Accord Bailey v. Ohio State University, 487 F. Supp. 601 (S.D. Ohio 1980); Weisbord v. Michigan State University, 495 F. Supp. 1347 (W.D. Mich. 1980); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971).

The reasoning and result found in the above authorities are followed in this court's decision in Wellman v. Trustees of Purdue University, 581 F. Supp. 1228 (N.D. Ind. 1984).

This court must now decide whether the above extends to damage claim against the university officials in their official capacity. In this regard Owen v. Lash, 682 F.2d 648 (7th Cir. 1982) must be followed.

All the claims for equitable relief remain for further proceedings. It is not here intended to rule on other issues dealing with the merits of this case. Discovery should now proceed and a further pretrial conference will be held.

Enter March 22, 1985.

/s/ (Hon.) Allen Sharp

CHIEF JUDGE, UNITED STATES DISTRICT COURT

FOOTNOTES

1. AMENDMENT XI - (Ratified February 7, 1795) - The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States of Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The reasoning and result here is in the same vein as other cases from this court dealing with the Eleventh Amendment. See Schott v. Hepler, 101 F.R.D. (N.D. Ind. 1984) and the authorities collected in footnote 1 at page 102 thereof.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HAMID R. KASHANI, Plaintiff,	)	
v.	)	Cause No. L83 0050
PURDUE UNIVERSITY, et al., Defendants.	)	

ORDER AND ENTRY OF JUDGMENT

Parties have jointly moved the Court to enter a final judgment dismissing, with prejudice, all monetary claims of Plaintiff against individual defendants in their individual capacities. Parties have done so with the understanding that the effect of this entry is to render the October 9, 1984 and March 22, 1985 Orders of this Court final and appealable.

The Court being duly advised in the premises, so Ordered this 28th day of June, 1985.

/s/ (Hon.) Allen Sharp

Chief Judge, United States District Court, Northern District of Indiana

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20-12-36-4. Corporate name--Powers and duties of trustees.--From and after the date of the location made as aforesaid, the corprate name of the trustees of the Indiana Agricultural College shall be "The Trustees of Purdue University"; and they shall take in charge, have, hold, possess and manage, all and singular, the property and moneys comprehended in said donations, as also the fund derived from the sale of the land scrip donated under said "act of congress," and the increase thereof, and all moneys or other property which may hereafter at any time be donated to and for the use of said institution. They shall also have power to organize said university in conformity with the purposes set forth in said act of congress [approved July 2, 1862], holding their meetings at such times and places as they may agree on, a majority of their number constituting a quorum. They shall provide a seal; have power to elect all professors and teachers, removable at their pleasure; fix and regulate compensations; do all acts necessary and expedient to put and keep said university in operation; and make all by-laws, rules and regulations required or proper to conduct and manage the same. [Acts 1869 (Spec. Sess.), ch. 6, §4, p. 24.]

20-12-1-2. Powers--(a) The Ball State University Board of trustees, Indiana State University board of trustees, the trustees of Indiana University, the trustees of Purdue University, and the University of Southern Indiana board of trustees, each as to its respective institution shall have the power and duty:

(1) To govern the disposition and method and purpose of use of the property owned, used, or occupied by the institution, including the governance of travel over and the assembly upon the property;

(2) To govern, by specific regulation and other lawful means, the conduct of students, faculty, employees, and others while upon the property owned, used, or occupied by the institution;

(3) To govern, by lawful means, the conduct of its students, faculty, and employees, wherever the conduct might occur, to the end of preventing unlawful or objectionable acts that seriously threaten the ability of the institution to maintain its facilities available for performance of its educational activities or that are in violation of the reasonable rules and standards of the institution designed to protect the academic community from unlawful conduct or conduct presenting a serious threat to person or property of the academic community;

(4) To dismiss, suspend, or otherwise punish any student, faculty member, or employee of the

institution who violates the institution's rules or standards of conduct, after determination of guilt by lawful proceedings;
(5) To prescribe the fees, tuition, and charges necessary or convenient to the furthering of the purposes of the institution and to collect the prescribed fees, tuition, and charges;
(6) To prescribe the conditions and standards of admission of students upon the bases as are in its opinion in the best interests of the state and the institution;
(7) To prescribe the curricula and courses of study offered by the institution and define the standards of proficiency and safisfaction within the curricula and courses established by the institution;
(8) To award financial aid to students and groups of students out of the available resources of the institution through scholarships, fellowships, loans, remissions of fees, tuitions, charges, or other funds on the basis of financial need, excellence of academic achievement, or potential achievement or any other basis as the governing board may find to be reasonably related to the educational purposes and objectives of the institution and in the best interest of the institution and the state;
(9) To cooperate with other institutions to the end of better assuring the availability and utilization of its total resources and opportunities to provide

excellent educational opportunity for all persons; and

(10) To lease to any corporation, partnership, association, or individual real estate title to which is in the name of an institution or in the name of the state for the use and benefit of the leasing institution.

(b) A lease may be for such term and for such rental, either nominal or otherwise, as the board determines to be in the best interest of the institution. No lease shall be executed under this section for a term exceeding four (4) years unless the execution is approved by the governor and by the state budget agency. The universities shall be exempt from all property taxes on any real estate leased under this section, and the lessee shall be liable for property taxes on the leased real estate as if the real estate were owned by the lessee in fee simple, unless the lessee is a student living in university-owned facilities.

(c) This section shall not be construed to deny any tax exemption that a lessee would have under other laws if the lessee were the owner in fee simple of the real estate. [Acts 1969, ch. 273, §2; 1971, P.L. 327, §1; 1973, P.L. 226, §1, P.L. 218-1985, §3.]